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C O N F I D E N T I A L SECTION 01 OF 03 GUATEMALA 000967

SIPDIS

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TAGS: [PREL](#) [GT](#) [KICC](#)

SUBJECT: GUATEMALA: ICC/ARTICLE 98 AGREEMENT AND SOFA
DISCUSSIONS

Classified By: Ambassador Marisa Lino for reason 1.5 (b)(d)

11. (C) Summary: On the Article 98 Agreement, discussions with the GOG covered all the points where the GOG counterproposal differs from the US text. New language was proposed by both sides ad ref. If approved, and the negotiating team believes the proposed changes are workable, we would have an agreement. On the SOFA text, the GOG side, which has had the text to consider since January 2001 and has never offered any comment on it, said it would be preferable to have the text of the broader agreement reviewed for constitutionality by the Constitutional Court. Estimate is this process might take about five months. The US team pressed hard to obtain detailed GOG response on the text before that process begins, in order to see what other issues might be raised by the GOG side. The GOG lead negotiator promised to provide a detailed response "very quickly." End Summary.

Article 98 Agreement Discussions

12. (C) On April 10, 2003, the PM-led interagency team met with Guatemalan MFA officials to discuss the GOG counterproposal to our Article 98 text. Amb. Maritza Ruiz de Vielman (MFA Advisor and former FM) led the GOG team and was accompanied by Amb. Regina Martinez de Palencia (Legal Department Director), Minister Counselor Sara Solis (Bilateral Affairs Director) and Angela Chavez (Legal Advisor to the Treaty Department). PM Senior Advisor Marisa Lino was accompanied by Mary Catherine Malin (L/WHA), Col. Al Ringgenberg (DOD/GC), David Lindwall (Political Counselor) and Robert Copley (Poloff).

13. (U) The Guatemalans had previously been provided with the Article 98 text that does not specifically mention the ICC. The discussion focused on three issues: the new paragraphs proposed (3 and 4 in the GOG counterproposal) and the closing clause. It was agreed that other minor discrepancies in the text between the English and Spanish versions would be worked out between the Embassy and the MFA subsequently.

14. (C) Paragraph 3 of the GOG counterproposal reads as follows:

Quote: Both Parties undertake to investigate and, if there are grounds for initiating a criminal complaint, to prosecute the alleged perpetrators, based on the national jurisdiction of each Party. Unquote.

The US side explained at some length the philosophy underpinning the US position on the Rome Statute and the concern we have for the potential for politically motivated allegations against US persons. The team noted that in the case of a politically motivated case there might not be a formal investigation initiated if a preliminary evaluation indicated the case was politically motivated. Thus, the GOG-proposed language for this paragraph was unacceptable. The GOG side noted that the importance of the paragraph was to avoid any possibility of impunity. Ruiz also explained that in the Guatemalan system there is a procedure which occurs prior to judicial review for deciding if an allegation is politically motivated or not, based on a decision by a designated panel of peers of the accused.

15. (C) After much discussion, both sides worked to craft a paragraph that might take into account their respective concerns. Lino emphasized that any language drafted would be strictly ad referendum and would be subject to a detailed review in Washington. The compromise language reads as follows:

Quote: Except in cases where the Party concerned determines that the allegations are politically motivated, each Party shall, as appropriate, investigate and prosecute cases of war crimes, crimes against humanity and genocide, to the full extent permitted by its domestic law. Unquote.

The US negotiating team believes this rewrite of the GOG paragraph, which would appear as paragraph 3 in the operative section of the agreement, may be an acceptable solution that does not commit the United States beyond what our domestic legislation can provide. A number of countries have raised

the issue of putting similar text into the operative paragraphs, and for the GOG it appears to be an important issue. Team recommends interagency consideration of this new operative paragraph text.

16. (C) Paragraph 4 of the GOG counterproposal reads as follows:

Quote: Nothing in this Agreement shall prevent the Parties from cooperating in any investigation by an international tribunal or from furnishing any evidence in their possession, even if said evidence was requested as part of a proceeding initiated against one of the persons referred to in this Agreement. Unquote.

The US team took pains to explain why this language was unacceptable, referring to the previous discussion about lack of impunity, but also describing at length the US rationale for not ratifying the Rome Statute. As non-Parties, neither side is obliged to cooperate with the ICC, but are not barred from doing so (Guatemala is a non-signatory, non-Party, and although the GOG has presented the Rome Statute to the Parliament for consideration, it is not expected to pass). The USG, however, would object to cooperation with the ICC if allegations were to be made against a US person. The GOG side noted the importance politically of this issue, because, again, the GOG needs to avoid the appearance of providing conditions for impunity, not only for US persons but also for Guatemalan persons. The Embassy believes this view may be the prevailing view in the MFA, but may not be shared within the Parliament.

17. (C) However, the GOG team was insistent that such language was necessary for an agreement. After much discussion, the US team tried to see if there might be a way to eliminate the perception, created by the proposed language that the United States would not object to cooperation with the ICC with respect to a US person under ICC investigation. The proposed solution reads as follows:

Quote: Nothing in this Agreement shall prevent the Parties from cooperating in any investigation by an international tribunal established by the United Nations Security Council or from furnishing any evidence in their possession, even if said evidence was requested as part of a proceeding initiated against one of the persons referred to in this Agreement. Unquote.

By using the same formulation used to avoid mention of the ICC, the team believes the additional phrase might make this paragraph acceptable.

18. (C) The original closing clause had inadvertently been dropped from the text provided to the GOG. The GOG team insisted that both the English and Spanish texts had to be equally authentic. Lino noted that, in such a case, it would be all the more important for the Embassy and the MFA to work out the differences in the translation of the final text.

Status of Forces Agreement Discussion

19. (C) The second part of the meeting focused on the USG proposed text (C175 approved text for WHA countries) for a longer term status of forces agreement. There was a pause while Ruiz was briefed on the subject by the other members of her team; she admitted she had not followed the issue. The Embassy had briefed the negotiating team that this did not seem to be a high priority for the MFA Legal Department and it is clear that is indeed the case. Lino pointed out that the enormous amount of work done by both sides to reach an agreement for each individual exercise - agreements that require Parliamentary approval - could be avoided by coming to terms on a longer term SOFA. Given the approach of NEW HORIZONS 2004, it would be to the advantage of both sides to reach such an agreement in time for that sizable training exercise. Ringgenberg added that the existence of a longer-term SOFA permits the DOD to have much more flexibility with respect to planning exercises and smaller scale activities with the GOG.

110. (C) Ruiz said there had been complaints about the previous agreements signed for individual exercises and indications that such agreements were contrary to the constitution. Since the proposed SOFA text is broader in scope and longer in terms of duration, the question of constitutionality could become even more prominent. She suggested strongly that it would be best to obtain an opinion on the constitutionality of the agreement from the Constitutional Court before proceeding to present it to the Parliament.

111. (C) Lino pressed hard to obtain a detailed GOG response on the text before that process begins, in order to see what other issues might be raised by the GOG. Ruiz said she would

have the Legal Department provide the Embassy with a detailed response "very quickly." She said there were probably three main objections on constitutional grounds, although she did not specify what those issues might be. When further pressed by Lino, Ruiz agreed that the Legal Department would list any other questions the GOG might have with the proposed longer term SOFA text. With that the session ended.

COMMENT

12. (C) The April 10 discussions made clear the GOG's political will to negotiate a compromise agreement with us which would provide the protections we seek from the ICC. Technical issues remain, and ultimately any agreement will have to be sent to Guatemala's Congress for ratification. The Embassy will continue to press the MFA at the highest levels for expedited attention to our longer-term SOFA proposal, and will report the MFA's comments as soon as received. Embassy welcomes Department's views of the compromise language to the Article 98 Agreement worked out with the MFA.
HAMILTON